

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

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76-7458

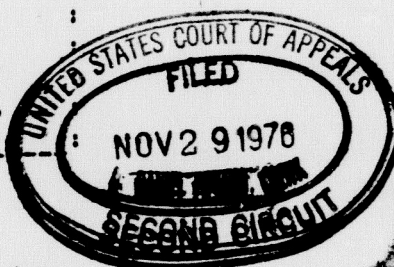
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHARLES MERRILL MOUNT,
Plaintiff,

Docket No. 76-7458

-against-

BOOK OF THE MONTH CLUB, INC.,
Defendant.



*B
P/S*

BRIEF & APPENDIX

BRIEF

of the appellant

CHARLES MERRILL MOUNT

PAGINATION AS IN ORIGINAL COPY

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THE ISSUES PRESENTED FOR REVIEW

IN A DECISION dated May 20, 1976, District Judge Brient granted summary judgement to defendant in belief that there were "no controverted factual issues". To do so was improvident. The status of Mrs. Pamela Taylor, described as a "reader" for the defendant, remains a question to be determined by trial. But whether or not she is "an independent contractor" as defendant claimed and the District Court accepted is moot. Plaintiff had no access to her and confided nothing to her care personally or through his publisher. The materials which were infringed were submitted, in the normal course of business, direct to defendant BOOK OF THE MONTH CLUB in its own name and at its registered office. Defendant's liability cannot be denied. By accepting copyright materials he accepted responsibility for safeguarding same. A second issue is whether a release fraudulently obtained by other defendants in a prior related action, and for which no authority existed in the Minutes of settlement dictated in his chambers by Hon. Lee F. Gagliardi, "constitutes an absolute bar bar to the second claim" as found by the District Court. Since no authority for such broad release exists, and it is contrary to

the letter and the spirit of the Minutes of settlement, it can be no bar. Additionally the District Court made factual error by believing that this overreaching form of release was ratified by a "consent to the order of discontinuance" signed "some five (5) days later". The said consent order actually was signed at the same time the Minutes of settlement were dictated in the chambers of District Judge Gagliardi, or nine days before the release.

The District Court erred again by finding that the present claim is barred by "three year statute of limitation found in 17 U.S.C., Section 115," because this section is varied by the Federal Equitable Rule. And the District Court's finding that, by rule of thumb, plaintiff already had been awarded damages enough for the losses of his copyrights, is hardly a proper consideration. The sum awarded him in the prior action constitutes less than 10% of the damages to which he had right by statute. While 90% of his statutory damages remain unrecovered no plaintiff can be rightfully turned away from a District Court on grounds that, in any case, lack statutory authority. District Courts must be guided by law.

STATEMENT OF THE CASE

A

These proceedings citing two causes of copyright infringement follow on prior proceedings which the same plaintiff, acting pro se, instituted against Harper & Row, Inc., Publishers (United States District Court for the Southern District of New York, 73 Civ. 3794). The grievance common to both matters is publication of a book entitled JOHN SINGER SARGENT the author of which was claimed to be "Richard Ormond". By Memorandum-Decision in that prior action filed October 17, 1975, Hon. Lee F. Gagliardi made adjudication that the so-called "Ormond" book was a plagiarism of a 1955 volume of the same name written by plaintiff. The action against Harper was settled for damages in the amount of \$12,500 and plaintiff specifically reserved his right "to proceed against Mr. Ormond or anyone else" (Minutes, page 2). The present defendant, BOOK OF THE MONTH CLUB, also was party to an earlier infringement of copyright of the same book written by plaintiff.

On the same day plaintiff received payment from Harper's attorneys he contacted BOOK OF THE MONTH CLUB which also had published the so-called "Ormond" book in the United States and Canada, and, no response having been received, on December 29, 1975, plaintiff instituted the present action before the District

Court by filing of Complaint. After personal consultation January 26, 1976, held at the offices of the attorneys for BOOK OF THE MONTH CLUB, at which financial settlement was discussed, defendant brought an improvised motion to dismiss.

The grounds set forth in defendant's motion are (1) that in the first cause of action plaintiff does not state a claim and the matter is time-barred, and (2) that in respect of his second cause of action defendant has received a "general release" through warranty it holds from Harper. Defendant further makes bizarre assertion that the release signed by plaintiff "expressly reserved plaintiff's freedom to sue Ormond, but no one else."

None of the grounds cited by defendant stand upon facts which are true nor have they any merit whatsoever in law.

B

THE FACTS

The several proceedings and copyright infringements herein involved all derive from activities of David K.M. McKibbin, a personage so notorious that the court need not be instructed at too great length that he is a flagrant homosexual without formal education who since 1934 has worked as a librarian at The Boston Athenaeum, a private subscription library. Apart from a pamphlet he plagiarized from

plaintiff's work in 1955 (which forms the first cause of action herein) McKibbin is without publication of any variety to his credit. His excessively vehement protestations of scholarship are seen in his letters Discovered in the prior action to derive from plaintiff's books, articles, and private letters to institutions.

In the period plaintiff's book JOHN SINGER SARGENT (W.W.Norton & Co., New York, 1955: 484 pages, with a complete catalogue of the artist's works) was researched and written David K.M. McKibbin occupied himself to harrass plaintiff. In particular McKibbin instructed many persons, including Senator Leverett Saltonstall of Massachusetts and his family, and Francis Henry Taylor, Director of the Metropolitan Museum, that they should not cooperate with or answer plaintiff's enquiries. After plaintiff had made a study of the drawings collection at the Fogg Museum, Cambridge, Massachusetts, McKibbin informed the keeper, Agnes Mongan, that plaintiff had stolen a drawing of Asher Wertheimer (which later miraculously re-appeared). McKibbin also labored to create an animus against plaintiff at the Frick Art Reference Library in New York, but not before, as his Discovered letters show, he copied out the extensive notes on its photographic collection of Sargent paintings plaintiff had dictated for the library.

Aware of these activities which clearly suggested an unstable mind, plaintiff's publisher, W.W.Norton & Co., Inc., gave instruction to all parties that no pre-publication copy of plaintiff's book

could be given to McKibbin, and that McKibbin must not be permitted to review plaintiff's book. In the face of this unparalleled and volatile situation in July 1955 BOOK OF THE MONTH CLUB received by messenger from Norton two and possibly three copies of the proofs of plaintiff's book. BOOK OF THE MONTH CLUB knowingly, willingly, and deliberately, sent these proofs to David K.M. McKibbin in Boston for the purpose of assisting him to draft a pamphlet which he had contracted to deliver to the Boston Museum of Fine Arts in September 1955. Defendant procured infringement of copyright by giving access to a party to whom it knew access must be denied.

The purpose of McKibbin's pamphlet, timed to coincide with the publication of plaintiff's massive 484 page book and catalogue raisonne', was to support McKibbin's Walter Mitty claim that he, and not plaintiff, was the principle authority on the artist John Singer Sargent. By making itself a party to this scheme and providing McKibbin with the access to plaintiff's work denied him everywhere on Norton's instruction, defendant knowingly and willfully procured copyright infringement.

McKibbin never again was able to galvanize himself into action and there are no further or other publications bearing his name. Notoriously attracted to young men (and considered a scourge on the Harvard campus) he developed a protege whom by means of the several hundred letters parts of which were disclosed in

the prior action pursuant to Discovery Order signed by Hon. Lee F. Gagliardi, he instructed in how to procure the materials for a book on John Singer Sargent from plaintiff's published works, articles, and manuscript letters in the files of museums plaintiff had assisted for two decades. The protege, Richard Ormond, by these means and following McKibbin's instructions, compiled a book which he illustrated by photographs which were plaintiff's private property or were made for plaintiff by a photographer working in Europe at plaintiff's expense.

On the recommendation of David K.M. McKibbin (whom in the disclosed letters details the several publishers who asked his advice concerning the so-called "Ormond" book) BOOK OF THE MONTH CLUB acquired rights to and distributed 10,000 copies of the "Ormond" book in the United States and Canada. This was the second occasion on which BOOK OF THE MONTH CLUB infringed the copyright of plaintiff's same book. It is hard to believe this could be fortuitous.

On this second foray into copyright infringement BOOK OF THE MONTH CLUB was assisted by the fact that Harper also was distributing 12,500 copies of the "Ormond" book. A total of 22,500 copies of a book based on plaintiff's studies and labor, largely in his own words, and illustrated by his own photographs, were sold in the United States and Canada without one penny going to plaintiff. By

the normal sliding scale written into all standard publishing contracts* plaintiff should have received \$60,000, without reference to the damages sustained to his reputation and earning capacity, which is governed by U.S.C. Title 17, Section 101. When normal royalties denied plaintiff are added to the damages for copyright infringement specified in U.S.C. Title 17, Section 101, a sum not exceeding \$210,000 is owed to plaintiff by the parties who contributed to or profited from the so-called "Ormond" book.

Plaintiff unfortunately was pre-occupied. The same letters disclosed in the prior proceeding show that in the years between 1965 and 1967 McKibbin and Ormond, working together, manufactured a series of libellous allegations of criminal acts against plaintiff. These they surreptitiously sold to a newspaper, THE SUNDAY TIMES, of London, on condition that their identity not be revealed. These libels, which are without any basis in fact and for which no supporting evidence ever has been produced by any party, have been examined by the District and Circuit Courts at Boston, and shortly go before the United States Supreme Court on the single dispositive issue whether the plaintiff herein (Mount) is a public figure. It should be added that Richard Ormond at all times has refused to enter any jurisdiction in the United States.

* Standard royalty terms are 10% on the first 5,000 copies, 12½% on the second 5,000 copies, and 15% on all copies thereafter.

In the years after 1969 plaintiff became further pre-occupied by domestic difficulties of a heart-rending kind when his beloved Catholic wife developed an instability of religious origin and the welfare of plaintiff four young children was imperiled. Frequently absent in Europe for this cause (plaintiff's wife was born in Ireland and she had disappeared from the United States) plaintiff never learned of the existence of the so-called "Ormond" book until July 22, 1973, when it was shown him by a neighbor in Neponsit. Though this was a new and most unwelcome burden plaintiff wrote to Harper the same day, and thereafter filed suit (73 Civ. 3794) which was assigned to Hon. Lee F. Gagliardi, United States District Judge, for all purposes. By Memorandum-Decision filed October 17, 1975, Judge Gagliardi found: "it cannot be said that the similarity of phrasing and the similarity of expression taken together are insubstantial as a matter of law."

In Motion papers filed after that Decision, and acting pursuant to U.S.C. Title 17, Section 101, which places minimum damages of \$250 on each separate infringement found in the so-called "Ormond" book, plaintiff was able to establish damages of \$150,000. Summoned to the chambers of Judge Gagliardi December 3, 1975, and met from 9.30 a.m. to 1.30 p.m. by the earnest and sympathetic desire of this distinguished jurist to dispose of this matter, plaintiff, acting pro se, agreed to accept from Harper damages of only \$12,500,

and to include a release also to the original English publisher, Phaidon Press Ltd., on the express condition that he reserved his right to make up the difference in his damages by proceedings against all the other parties who contributed to or benefited from the s-called "Ormond" book.

These terms and the reservations of rights made by plaintiff were set forth on the spot and with great care by Judge Gagliardi in the minutes he dictated in his chambers. No party to that careful and deliberate record of the agreement of settlement has right to make representation which does not conform to the explicit language of the Minutes, which must be enforced.

I

THE FIRST CAUSE OF ACTION

TOLLING OF THE STATUTE AND LAST INFRINGING ACT

The so-called "McKibbin" pamphlet follows the sequence of plaintiff's book, quotes the same matters, employs plaintiff's thought, words, and interpretations, and includes a catalogue raisonne copied from that created by plaintiff. Paintings plaintiff had newly discovered in France during the previous eight months appear in the "McKibbin" catalogue, though McKibbin had not been to France. Because the "McKibbin" pamphlet was set in type in September 1955, two months

before formal publication of plaintiff's book, and because W.W. Norton & Co., Inc. had taken steps to insure that no pre-publication copy reached McKibbin, the means by which the plagiarist gained access to plaintiff's work remained a mystery for nineteen years. During all that time plaintiff had no cause of action because he could not prove access.

In April 1974 pursuant to Discovery Order signed by Hon. Lee F. Gagliardi, United States District Judge, there were disclosed to plaintiff letters written by McKibbin which showed BOOK OF THE MONTH CLUB to have supplied the "proofs" of plaintiff's book to McKibbin. Tolling of the statute commences from the time the plaintiff or the person under whom he claims discovered the grievance or could with reasonable diligence have discovered it. In this cause of action therefore the statute began to toll in April 1974 when plaintiff discovered the access provided by McKibbin by BOOK OF THE MONTH CLUB. This cause of action against BOOK OF THE MONTH CLUB is not time-barred.

In matters of copyright infringement a second method of computing statutory limitation is provided by U.S.C. Title 17, Section 115, which the courts have interpreted to mean that the three year statutory limitation does not commence to toll until the last infringing book has been sold. "Subsection (b) of this section simply made uniform three year limitation on infringement proceedings and did not alter basic pre-existing rule that limitation begins from the date of last infringing act." (Baxter v. Curtis Industries, Inc.,

D.C. Ohio, 1962, 201 F. Supp. 100). Plaintiff having with his own eyes seen the plagiary called the "mCkibbin" pamphlet on sale at the Boston Museum of Fine Arts October 17, 1974, it is unlikely that the last infringing act has yet occurred.

Plaintiff's suit based on BOOK OF THE MONTH CLUB's willful procurement of copyright infringement is not time-barred since that "last infringing act" seems not to have taken place, and, in any case, tolling of the statute did not commence until plaintiff discovered the procurement of copyright infringement by BOOK OF THE MONTH CLUB through disclosure in April 1974 of the McKibbin letters pursuant to Discovery Order signed by Hon. Lee F. Gagliardi.

Nor has plaintiff been guilty of any lack of diligence. He wrote to BOOK OF THE MONTH CLUB on the same day he received payment of damages in the prior action against Harper (in the course of which the McKibbin letters were disclosed) and Complaint was filed promptly seventeen days thereafter.

II

THE STATUS OF PAMELA TAYLOR MOOT

BOOK OF THE MONTH CLUB is responsible for the procurement of copyright infringement alleged in the first cause of action. In July 1955, on receipt of proofs from the printer located in Binghamton,

New York, plaintiff's publisher, W.W.Norton & Co., Inc., packed two and possibly three sets in an envelope, sending them, by messenger, to the offices of BOOK OF THE MONTH CLUB. No letter, note, nor other communication was included. Submission was being made to BOOK OF THE MONTH CLUB itself as a corporate entity and as part of the regular and continuous practice of all major publishers.

By acceptance of this valuable property, in which plaintiff had invested five years of his life and all his fortune, and which W.W. Norton had supplemented by investing over \$10,000 for editorial labor, design, preparation, and the manufacture of 464 book plates and 78 illustration plates, there existed a corporate responsibility on the part of BOOK OF THE MONTH CLUB to exercise care and guard this valuable property against misadventure or theft. The property in addition was protected by plaintiff's common law copyright up to and including November 7, 1955, and thereafter was protected by statutory copyright pursuant to U.S.C. Title 17.

No sooner were the proofs delivered to it than BOOK OF THE MONTH CLUB took steps to procure infringement of copyright of the material entrusted to it. Pamela Taylor, who had been at BOOK OF THE MONTH CLUB many years, was an employee with tenure. As wife of Francis Henry Taylor, Director of the Metropolitan Museum, she exercised administrative functions within the company, disposed

reading assignments to lesser persons, and generally, in part guided by an aggressive personality, wielded enormous influence within BOOK OF THE MONTH CLUB. For more than twenty years, since her husband had been Director of the Worcester Art Museum, in Massachusetts, she had been on terms of intimacy with David K.M. McKibbin. She had been aware of McKibbin's unnatural hostility towards plaintiff. She had been the avenue by which McKibbin asked Francis Henry Taylor not to cooperate with plaintiff's researches and enquiries at the Metropolitan Museum.

Pamela Taylor also knew that David K.M. McKibbin was struggling to comply with a contract with the Boston Museum of Fine Arts which called upon him to deliver in September 1955 ready for the printer a pamphlet on the same subject as plaintiff's book. Pamela Taylor therefore was aware that due to his deficient literacy and absence of any academic education whatsoever (not alone in history and art history, but in grammar) McKibbin was quite incapable of producing the said pamphlet. His incapacity remains.*

As a responsible official of BOOK OF THE MONTH CLUB Pamela Taylor sent to McKibbin in Boston the complete proofs of plaintiff's

* In 1966 McKibbin accepted an advance of \$5,000 from the National Gallery of Art, Washington, to write a book on John Singer Sargent. The contract was unilaterally cancelled by the National Gallery in January 1975 because after nine years McKibbin was unable to produce a manuscript. Additionally he had severely embarrassed the Gallery by involving its name in his libels against plaintiff, and because he had been caught filching plaintiff's letters from sister institutions as his form of "research".

work, from which he produced the pamphlet to which he put his own name as author. The "intent" of Mrs. Taylor is unmistakeable. She deliberately, knowingly, and willfully set about to procure copyright infringement. Her act assuredly was the act of BOOK OF THE MONTH CLUB, for by disposing of plaintiff's book Mrs. Taylor acted upon her apparent authority to act for her principle.

BOOK OF THE MONTH CLUB did not treat a woman of such immense authority and prestige as the wife of the Director of the Metropolitan Museum as a minor employee. She had been placed by BOOK OF THE MONTH CLUB in a position which enabled her to commit the procurement of copyright infringement while apparently acting within her authority. (Second Restatement of Agency, Section 261. Cf. Wise v. Western Union Tel. Co., 1934, 6 W.W.Harr. 155, Del., 172 A 757; Ripon Knitting Works v. Railway Express Agency, 1932, 207 Wis. 452, 240 N.W. 840.)

PLAINTIFF UNAWARE OF THE EXISTENCE
OF PAMELA TAYLOR

The acts of Pamela Taylor were the acts of defendant. But, in so far as law is concerned, Pamela Taylor does not enter into this matter and her existence and status are moot. Neither plaintiff nor his publisher ever had contact with Pamela Taylor nor made submission to her personally. Plaintiff and his publisher dealt exclusively with BOOK OF THE MONTH CLUB, which, by accepting responsibility for a

copyright manuscript legitimately submitted by a major publishing house, became responsible for safeguarding that copyright material.

III

SECOND CAUSE OF ACTION

THE MINUTES OF SETTLEMENT IN THE PRIOR ACTION GOVERN

The District Court found that a release given to Harper is also a release to BOOK OF THE MONTH CLUB, even though the MINUTES of the settlement agreement specifically state otherwise. Summarizing the settlement terms Hon. Lee F. Gagliardi stated that plaintiff was:

... reserving, of course, your right to proceed
against Mr. Ormond or anyone else that you may
desire to proceed against (italics supplied)

This was the intent of the settlement. Nothing else was envisioned by any party. Plaintiff has set forth in paragraphs numbered 47-51 of his affidavit in opposition sworn to February 20, 1976, that the release thrust before him in the offices of Paskus, Gordon & Hyman appeared to have been an effort to trick him into giving up rights against his expressed wishes and without his knowledge. If the

release has that effect it is not valid. The only authority for this release is found in the Minutes dictated by Judge Gagliardi, page 5 lines 2 to 4, wherein he states:

THE COURT: I understand that the defendant will prepare the appropriate release in the form which we have indicated. Is that satisfactory? (*italics supplied*)

The releases prepared by attorneys for the defendant therefore must conform to the intention of the court and the parties as set forth on page 2, lines 2 to 20 of the Minutes. In the words of Judge Gagliardi, as plaintiff I was:

... reserving, of course, your right to proceed against Mr. Ormond or anyone else that you may desire to proceed against

Despite the clear intent of the settlement an effort was made to trick, cheat, or otherwise swindle plaintiff of the rights specifically reserved to him in the agreement of settlement. This has not succeeded. The principle is not a new one and it has been said often enough that intent governs rather than form, and that the court will look to the four corners of the instrument to determine it. A litigant cannot be tricked into giving up those things which he expressly reserved and which the court understood him to be reserving. No possible latitude for misunderstanding

exists. The Minutes dictated by Judge Gagliardi are admirably simple, direct, and clear. All parties assembled in the chambers of Judge Gagliardi understood that plaintiff was accepting most inadequate compensation for damages which he would thereafter augment through further litigation against the others who participated in or profited from the same copyright infringement.

Judge Gagliardi stated that plaintiff was reserving his right to proceed against "anyone else you may desire to proceed against". Plaintiff thereupon confirmed this (Minutes, page 2, line 21). Attorneys for Harper may well have attempted to trick plaintiff of this explicitly reserved right, but they did not succeed. The release thrust before plaintiff in their offices is valid only in so far as it conforms to the Minutes of the settlement. No authority exists for the addition of anything whatsoever.

Plaintiff is further protected because New York is one of nineteen states which have adopted a statute which makes it law that no party can give up by a release or any other instrument any right which he did not expressly determine to render up. THE LAW OF TORTS, William L. Prosser, Fourth Edition, (1971) sums up the matter in this way: "The only desirable rule would seem to be that a plaintiff should never be compelled to surrender his cause of action against any wrong-doer unless he has intentionally done so, or unless he has received such full compensation that he is no longer entitled to maintain it." These conditions do not exist. Plaintiff therefore

did not surrender his cause of action.

An additional factor is that the plaintiff in this action both was libelled and had his copyrights stolen by the so-called author of the infringing book, and by his mentor, the homosexual librarian McKibbin. Plaintiff therefore was obliged to appear before a United States District Court pro se and without counsel of any sort. Where a deliberate effort so obviously has been made to trick a pro se plaintiff the court has special responsibility to enforce the terms of settlement with due regard to the intent.

IV

THE TWO CONCEALED WARRANTIES ARE WAIVED

Whereas by reason of his poverty plaintiff had been forced to appear pro se and without counsel to guide him, defendant Harper retained the law firm of Paskus, Gordon, & Hyman, no fewer than three members of which appeared in the chambers of Hon. Lee F. Gagliardi December 3, 1975. Their purpose was not alone to overawe a pro se plaintiff, but to bring to bear the combined legal knowledge, skill, and astuteness of Charles H. Lieb, Christina E. Clayton, and Philip H. Schaeffer. Surely this was an awesome team of professional lawyers to appear en masse in Judge Gagliardi's chambers against one pro se plaintiff.

Nonetheless it would appear that these three lawyers were far too clever by half. Consistent with the perjuries, tricks, and bad faith which Philip H. Schaeffer had made the principle feature of the litigation, they now determined to enter into a settlement while deliberately concealing from plaintiff and court the existence of two warranties. By this settlement they entered into and which was recorded with the greatest care in Minutes by Judge Gagliardi, Harper's attorneys agreed that plaintiff reserved specific right to proceed against "anyone else". Harper's attorneys voiced no objection to this basic condition of the settlement, for they were aware from plaintiff's words and demeanor that without this condition he would not accept the minor sum of \$12,500 as damages against their client instead of \$150,000 to which he knew himself to be entitled pursuant to U.S.C. Title 17, Section 101.

To all those gathered in the chambers of Judge Gagliardi it was well known that plaintiff intended to follow settlement of the action against Harper with proceedings against BOOK OF THE MONTH CLUB. In the face of this knowledge Harper's attorneys made decision deliberately to withhold from plaintiff and the court the existence of a warranty existing from Harper to BOOK OF THE MONTH CLUB. The dishonorable purpose of the attorneys defeated itself. To be upheld by any other court that warranty must have been made known to plaintiff and Judge Gagliardi, and entered into the settlement against Harpers.

Instead Harper's attorneys deliberately concealed the existence of the warranty. But they went a step further. They agreed to a settlement whereby the terms of the warranty were waived.

Harper by its attorneys, present en masse, agreed specifically that plaintiff would be free thereafter to proceed against "anyone else". The settlement Minutes therefore constitute an absolute bar to the concealed warranty. In the face of the agreement deliberately and knowingly entered into by a team of professional attorneys representing Harper, which agreement specifically waived the concealed warranty, such warranty ceases to have effect with respect to the present cause of action.

Harper by its attorneys agreed that plaintiff should be free to bring proceedings against "anyone else". They profited thereby. Plaintiff's damages were reduced by \$137,500. Harper cannot profit to this enormous degree and then, in the second stage of the same litigation, claim protection from a warranty they deliberately concealed from both court and plaintiff.

RICHARD ORMOND THE PRINCIPLE PARTY IN INTEREST

Defendant brings forth the specious argument that by terms of the warranty, whereby Harper is obliged to discharge any damages assessed against BOOK OF THE MONTH CLUB, Harper is the "principle party in interest". The absurdity of this is revealed when it becomes known

that at the same time Harper continues to conceal the existence of a second warranty which it holds from the so-called author, Richard Ormond. By the logic of defendant's Memorandum neither Harper nor BOOK OF THE MONTH CLUB can bear any real damages for in all actions it is Richard Ormond who is the "principle party in interest." Yet demonstrably, in the Minutes dictated by Judge Gagliardi, Harper waived release to Richard Ormond by name.

Having waived its release to Richard Ormond, from whom it holds warranty and whom is, by its logic, the "principle party in interest", Harper also waived release to BOOK OF THE MONTH CLUB. An abhorrent trickery, intended to deprive a pro se plaintiff of his rights specifically reserved, has backfired. The three attorneys who negotiated in bad faith in the chambers of Judge Gagliardi, concealing from the court the existence of two warranties, tricked themselves.

The Minutes hold that plaintiff has reserved his "right to proceed against Mr. Ormond or anyone else." The words are clear, definite, and binding upon the parties. They are the "intent" of the settlement. Having profited so vastly thereby the publishers must abide by the terms of the settlement.

V

SECOND CAUSE OF ACTION NOT TIME-BARRED

BOOK OF THE MONTH CLUB has put before the court a group of

manipulated dates in no way substantiated by evidence and by which it attempts to make claim that plaintiff's second cause of action is time-barred.

Plaintiff established through INTERROGATORIES propounded to Harper in the prior action, and by the sworn replies of Philip H. Schaeffer dated October 31, 1973, that as of that date the infringing book was still being offered for sale by BOOK OF THE MONTH CLUB. It has not yet been established when defendant ceased to offer the infringing book. At this moment therefore no one is aware when the last infringing act, to which reference is made in U.S.C. Title 17, Section 115, and subsequent decisions, took place or if it has yet taken place.

Whatever the final conclusion with respect to whether a final infringing act has taken place, it is certain that at this time plaintiff's claim cannot be time-barred. This is especially the case because it was established and accepted by the court in the prior action that plaintiff only became aware of the existence of the infringing book on July 22, 1973. The statute commencing its tolling on that date this action could only be time-barred if commenced after July 21, 1976.

ARGUMENT

The present defendant, BOOK OF THE MONTH CLUB, has become embroiled

in the tricky, unsavory, and unethical methods by which the attorneys for Harper previously attempted to deprive pro se plaintiff of his rights and profits from his labor. Harper's attorneys failed. This was not through skill on the part of pro se plaintiff, but because the copyright infringements of which Complaint was made were so grotesque and overwhelming. Harper's attorneys spent two and a half years attempting to sweep an elephant under a carpet and failed.

Attorneys for the BOOK OF THE MONTH CLUB are aware of the enormous scope of those infringements and that they are not defensible. They know that at law plaintiff is entitled to a minimum of \$150,000 through application of the statute, and that so far he has received on the derisory sum of \$12,500. After first inviting plaintiff to their offices, where they offered to make payment to him for his damages, they instead presented to the District Court an improvised motion to dismiss so utterly without merit they did not believe in it themselves.

Like magicians the defendant's attorneys made a trusted employee of their client, no less a personage than the influential wife of the Director of the Metropolitan Museum, who had long service, tenure, administrative responsibilities, and immense authority within their organization, "an independent contractor". This was dust in the eyes of the District Court, for the status of Pamela Taylor was moot. Neither plaintiff nor his publisher at any time

had contact with her, made submission to her, nor was aware of her existence. Submission of the copyright materials was made to the defendant BOOK OF THE MONTH CLUB, which bears sole responsibility for safeguarding those materials.

Defendant's attorneys manipulated dates to beat the statute of limitation. Where Judge Gagliardi specifically stated that plaintiff reserved his right of action against "anyone else" they flagrantly altered his words to read "no one else". They even produced out of their sleeves a warranty which Harper deliberately concealed from the prior court and the plaintiff, and which they demand be honored after Harper profited by a settlement which specifically waived its provisions by reserving to plaintiff the right to bring suit against "anyone else". The terms of the previous settlement constitute an absolute bar to this warranty. They even attempt to make claim before this honorable court that Harper is the "principle party in interest" in these proceedings, in their mad wheeling and dealing overlooking that all defendants in both actions hold a parallel warranty from Richard Ormond, - and that this too specifically has been waived.

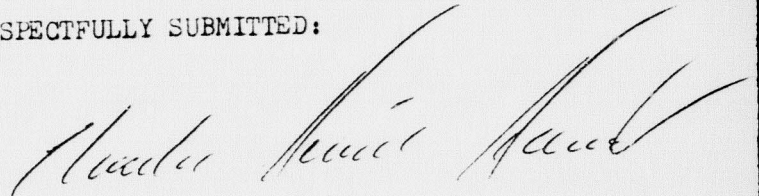
It is sad that these parties have got themselves into such a frightful state, but their bizarre and makeshift arguments and manipulations of fact have not presented to this court any basis upon which the Complaint could rightly be dismissed, and the improvident action of the District Court should be corrected.

CONCLUSION

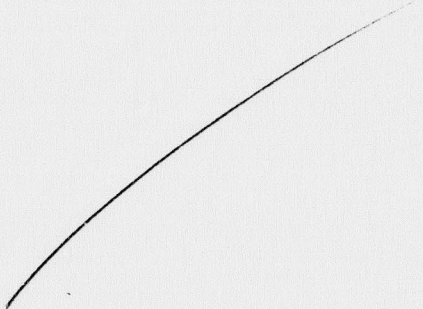
The case should be returned to the District Court for trial.

DATED: Neponsit, New York
November 29, 1976.

RESPECTFULLY SUBMITTED:



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHARLES MERRILL MOUNT, :
Plaintiff, :
v. : 73 Civ. 3794
HARPER & ROW PUBLISHERS, INC., and :
PHAIDON PRESS LTD., :
Defendants. :
----- x

Before:

HON. LEE F. GAGLIARDI, District Judge

New York, December 3, 1975
Room 2603 - 12:45 p.m.

APPEARANCES

CHARLES MERRILL MOUNT, Pro Se
PASKUS, GORDON & HYMAN, Esqs.,
Attorneys for Defendants,
Philip H. Schaeffer, Esq.,
Christina E. Clayton, Esq., of Counsel

- - -

THE COURT: Mr. Mount, we have been here discussing a disposition of your matter this morning and it has been indicated to me that you are willing to accept the sum of \$12,500 in full settlement of your claim against the defendant Harper & Row and to include in the settlement for this amount a release also to Phaidon Press Ltd. of England, reserving, of course, your right to proceed against Mr. Ormond or anyone else that you may desire to proceed against, other than the two named corporations which I have just indicated, and the defendant Harper & Row has indicated that they are willing to settle this case with you for the sum of \$12,500.

We have had an extensive discussion this morning and I have indicated to you that I was trying to act merely as an honest broker in bringing the two sides together here and I had no opinion whatsoever with respect to the value of your case or the reasonableness of this settlement. You understand that to be so, do you not, Mr. Mount?

MR. MOUNT: I do.

THE COURT: No pressure has been exerted upon you in any way whatsoever to compromise this case and this is your free choice and your free will to do so, is that correct?

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2 MR. MOUNT: That's correct, sir.

3 THE COURT: All right.

4 MR. SCHAEFFER: Your Honor, one question has
5 occurred to me in sitting here.

6 I do not know whether Harper & Row or Phaidon
7 Press has any of the volumes left in its inventory, but
8 we would expect to continue selling the Ormond book in
9 consideration of the \$12,500 we are paying, and if for
10 some reason they wish to reprint the book, that they would
11 be able to do so, also. None of this would be with any
12 prejudice to Mr. Mount's claim against Ormond, but this
13 \$12,500 is, in effect, a purchase of Mr. Mount's approval
14 with respect to those two corporate defendants.

15 MR. MOUNT: That is a very wide question.
16 Could this be off the record for a moment?

17 MR. SCHAEFFER: Sure.

18 (Discussion off the record.)

19 THE COURT: Mr. Mount, we were off the record
20 and we discussed the possibilities with respect to this
21 and you have indicated that what has been proposed here is
22 acceptable to you, is that correct?

23 MR. MOUNT: Yes.

24 THE COURT: All right. I understand that the
25 check in settlement will be forthcoming within a period of

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2 seven days.

3 MR. SCHAEFFER: What I would suggest, your
4 Honor, is that if Mr. Mount would come by my offices at
5 733 Third Avenue and visit with Miss Clayton she will have
6 at that time the appropriate releases prepared together
7 with a stipulation of discontinuance of this action with
8 prejudice and we will have the check drawn to his order.
9 We will hold the stipulations and the releases in escrow
10 pending two weeks, giving the check time for clearance,
11 and that will conclude the matter. Then I will submit
12 the stipulation of discontinuance.

13 THE COURT: What I would rather do with the
14 stipulation of discontinuance is have you sign it here
15 right now, since you are both here, and I will not file it
16 for two weeks, and if I haven't heard from you by then we
17 will file it, if I have heard from you by then we will tear
18 it up.

19 MR. MOUNT: Mr. Schaeffer didn't mention a
20 date for this visit.

21 MR. SCHAEFFER: Let's make it a week from
22 Friday.

23 MR. MOUNT: Very well.

24 MR. SCHAEFFER: Is that convenient to you?

25 MR. MOUNT: Yes.

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2 THE COURT: I understand that the defendant
3 will prepare the appropriate release in the form which
4 we have indicated. Is that satisfactory?

5 MR. MOUNT: Yes.

6 MR. SCHAEFFER: Your Honor, I would also ask
7 that space be provided in this stipulation which just went
8 on the record and that both Mr. Mount sign that and that
9 we sign that on behalf of our defendants.

10 THE COURT: All right.

11 You want to order --

12 MR. SCHAEFFER: I am going to order the minutes
13 for Mr. Mount and for us, yes.

14 I would ask the reporter to just put in at the
15 end a space for the minutes to be signed and an acknowledg-
16 ment provided that the foregoing is agreed to by Mr. Mount
17 on behalf of himself and by my firm on behalf of Harper &
18 Row Publishers, Inc. and Phaidon Press Ltd.

19 THE COURT: All right. Nice to have seen you
20 all.

21
22 -----
Charles Merrill Mount

23 STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

24 Paskus, Gordon & Hyman
25 Paskus, Gordon & Hyman,
Attorneys for Defendants

On December 12, 1975 before

me

personally came

to me known, and known to me to be the individual described
in, and who signed the foregoing stipulation, and duly
acknowledged to me that he signed the same.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES MERRILL MOUNT,
Plaintiff,

-against-

BOOK OF THE MONTH CLUB, INC.,
Defendant.

Docket No. 76-7458
75 Civ. 6474

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

CHARLES MERRILL MOUNT being duly sworn deposes and says:
that I am over 18 years of age and reside at 230 Beach 146 Street
Neponsit, Queens County, New York, and that upon *November 29* ~~February 25~~,
1976, I duly served the annexed MEMORANDUM upon Mr. Paul J.
Newlon, attorney for defendants, at 345 Park Avenue, New York,
N.Y., 10022, by depositing a true copy of same enclosed in a post-
paid properly addressed wrapper and entrusted same to an official
depository under the exclusive care and custody of the United States
Postal Service within the State of New York.

Charles Merrill Mount
CHARLES MERRILL MOUNT

Sworn to before me this
29 day of ~~February~~, 1976.
November

Marilyn Lief Kramberg
NOTARY PUBLIC

MARILYN LIEF KRAMBERG
NOTARY PUBLIC, State of New York
Qual. in Queens Co. No. 4504754
Commission Expires March 31, 1977

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -X
CHARLES MERRILL MOUNT,

Plaintiff,

-against-

BOOK-OF-THE-MONTH CLUB, INC.,

Defendant.
----- -X

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: Pro Se 75 Civ. 6474-CSH
:

: MEMORANDUM AND ORDER
:

44447

Brieant, J.

By his Pro Se complaint filed December 29, 1975, and initially assigned to me, plaintiff pleads two causes of action. Defendant's motion for summary judgment was heard on March 19, 1976 and decision reserved. Thereafter, effective May 3, 1976, the action was reassigned to Judge Haight of this Court pursuant to IAC Rule 10.

Since the motion had been fully submitted before me and was held sub judice at the time of the reassignment, Judge Haight has agreed that it is appropriate for me to render the decision thereon.

There are no controverted factual issues. For the reasons set forth below, summary judgment is granted.

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BEST COPY AVAILABLE

Defendant is what its name implies. It publishes books under license, which are sold by mail to its members, who may select from monthly lists of selections and alternate selections recommended by the Club. The books are newly published popular selections, which the Club obtains by license from major book publishers. It manufactures the requisite number of copies, usually from the original plates of the major publisher. A copy of a book issued by the Book-of-the-Month Club is physically indistinguishable from a copy of the same book sold through book stores by the initial publisher.

Harper & Row Publishers, Inc. ("Harper"), prior to April 1970, published a book entitled "John Singer Sargent: Paintings, Drawings, Watercolors" by Richard Ormond (the "Ormond book"). By written agreement, Harper, on April 23, 1970, granted and assigned to this defendant the exclusive Book Club rights to the Ormond book for a period of three years. Defendant manufactured the Ormond book for sale to its members, in form identical to the book manufactured by Harper, with Harper's name appearing thereon.

Plaintiff Charles Merrill Mount, a recognized authority on the works of John Singer Sargent, had published on November 8,

1955 his own book entitled "John Singer Sargent: A Biography."

The Harper book infringed the copyright of plaintiff's book.

In 1973 plaintiff brought an action in this Court to recover damages and for injunctive relief arising out of this infringement.

(Mount v. Harper & Row Publishers, Inc., 73 Civ. 3794-LPG).

This litigation, hereinafter referred to as the Harper action, was settled and discontinued by Court order dated December 17, 1975, made on consent, under circumstances detailed below.

Plaintiff's first claim pleaded in this case asserts that jurisdiction arises under Title 17 of the United States Code, and pleads that Mrs. Pamela Taylor, a reader "employed by defendant", secured a copy of the proofs of plaintiff's book in the Summer of 1955 and gave the proofs to one McKibbin, not a party to this litigation, who infringed plaintiff's common law copyright in the unpublished proof of the book, by means of a pamphlet published in January 1956 by the Boston Museum of Fine Arts, also not a party to this action.

As to the first claim, there is no evidence proffered by plaintiff on this motion which would impose legal responsibility on this defendant for the unrelated, tortious conduct of Mrs.

Pamela Taylor, who was not defendant's employee, and did not work under its supervision and control. Rather, it appears clearly that Mrs. Taylor was an independent contractor, retained for the limited purpose of reading plaintiff's pre-publication galleys in her home for \$10.00, to express an opinion as to its value. Defendant used a number of such readers to perform this service, and, for a fixed fee, to give their largely subjective views on the books read. Defendant used this information as a market study, to decide whether to seek a book club license for a particular book. Mrs. Taylor did not recommend plaintiff's book, and it did not become a publication of defendant.

Viewing the affidavits most favorably to plaintiff, there is no basis for imposing vicarious liability on this defendant, if, as alleged, Mrs. Taylor made the proofs available to an independent infringer, McKibbin. In addition, the first claim is barred by the three-year statute of limitations. 17 U.S.C. §115(b).

The second claim pleaded here alleges that defendant infringed plaintiff's copyright by its publication of the Ormond book pursuant to its 1970 license taken from Harper, previously mentioned.

It is clear that this defendant published the infringing Ormond book as an assignee, licensee and successor in interest of Harper. Indeed, on April 23, 1970, when Harper sold exclusive Book Club rights to defendant for three years, it warranted its own assignors' copyright and indemnified defendant against claims such as this.

Prior to commencing this action, plaintiff settled and discontinued the Harper action before Judge Gagliardi of this Court, in return for a substantial cash payment from Harper. On December 12, 1975 he acknowledged and delivered to Harper a general release which by its terms includes Harper's "successors and assigns," one of which this defendant is. The only reservation in the form of release is the right to sue Ormond.

This release constitutes an absolute bar to the second claim. It is true that earlier comments on the record before Judge Gagliardi on December 3, 1975 in the Harper case, as to plaintiff's intentions to sue "Mr. Ormond or anyone else" after settlement of the Harper action, are somewhat ambiguous, but all of these discussions must be deemed merged in the form of the general release, given at a later date.

The proceedings before Judge Gagliardi resulting in plaintiff's agreement to settle his litigation against Harper contemplated that a written release would be given. Plaintiff concedes (§49 of his February 20, 1976 affidavit) he knew, when he signed the Harper release, that it was broader in form than his claimed understanding of the settlement agreement negotiated before Judge Gagliardi. So knowing, he signed. If, as he now claims, he was overreached or "tricked" by Harper's attorneys, then his proper remedy would have been to seek judicial reformation of his release as soon as he discovered that he had been "tricked," or move before Judge Gagliardi to vacate the order which discontinues the Harper litigation with prejudice. Possibly an independent action might lie to reform the instrument, but it is hard to see how reformation can be obtained when the aggrieved party concedes that he knew at the time he was signing the release that it was broader in scope than his understanding of the settlement, and then some five (5) days later, he signed the consent to the order of discontinuance.

Plaintiff is an articulate, intelligent pro se litigant who, by his own affidavit, shows that he knowingly signed the more precise form of release tendered to him, in order to receive Harper's

money, thereby limiting himself to suing only Ormond. It is unreasonable to assume that Harper, advised by counsel, intended to pay twice, once in its own lawsuit, and again, here, as indemnitor of this defendant. Plaintiff concedes that he knew as early as October 31, 1973 that this defendant was selling Harper's book pursuant to Harper's authority (Affidavit of Charles Merrill Mount, sworn to February 20, 1976).

Furthermore, except for a sale of remaindered copies amounting to \$551.00, made by Book-of-the-Month Club to Marboro Books, Inc. in 1973, the second claim pleaded is also substantially barred by the aforementioned three-year statute of limitations.

The Court declines to award counsel fees as requested on this motion. We are reluctant to penalize a pro se litigant whose claim would have merit but for the statute of limitations and the release, and would regard the award of counsel fees under these circumstances as unduly inhibiting access to the Courts.

The Clerk of this Court shall enter judgment pursuant to Rule 58(1), F.R.Civ.P. that all relief shall be denied.

So Ordered.

Dated: New York, New York
May 20, 1976

Charles L. Briant

CHARLES L. BRIANT
U. S. D. J.

DOCKET NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	S	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMBER
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PLAINTIFFS

DEFENDANTS ~~F. M. J.~~
H. M. J.

MOUNT, CHARLES MERRILL

BOOK OF THE MONTH CLUB, INC.,

COPYRIGHT INFRINGEMENT
USC Title 17

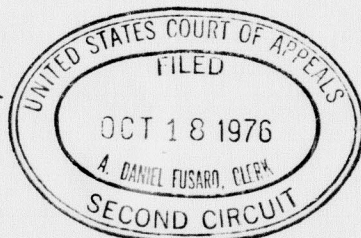
CAUSE

VP

Charles M. Mount PRO SE
230 Beach 140 Street
Neponsit, New York 11694
945-1279

ATTORNEYS

Paul Weiss Rifkind Wharton & Garrison
345 Park Ave., N.Y.C. 10022



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5-28-76

MOUNT, CHARLES MERRILL VS. BOOK OF THE MONTH CLUB, INC.

PROCEEDINGS

RECEIVED, J.

NR.

- 2-29-75 ✓ Filed Complaint and issued summons.
- 1-26-76 ✓ Filed Summs with Mrashal's ret. Served:
Bk of the Month Club Inc by F. H. Brown on 1-7-76
- 2-28-76 ✓ Filed Slip & Order that deft's time to answer the complt is ext to 2-16-76..Brieant, J.
- 3-18-76 ✓ Filed Deft's Notice of Motion for an order dismissing 1st cause of action etc....
.....3-2-76 at 9:30AM...Rm 619
- 3-18-76 ✓ Filed Deft's Memo in support of motion to dismiss.
- 3-27-76 ✓ Filed Pltff's Motion for an order to put trial on calendar with priority...ret 3-10-76
at 4:30PM.
- 3-27-76 ✓ Filed Pltff's Memo in opposition to deft's motion.
- 3-27-76 ✓ Filed Pltff Affidvt in opposition to ~~plttbox~~ deft.
- 3-27-76 ✓ Filed Pltff's Counter-Statement pur to Gen Rule 9(g).
- 3-2-76 ✓ Filed Slip & Order adj deft's motion until 3-10-76 at 4:30AM...Brieant, J.
- 3-8-76 ✓ Filed Slip & Order adj plttf's motion until 3-12-76... Brieant, J. (Gee)
- 3-11-76 ✓ Filed Deft's Affidvt in support of its motion for judg. dism. action.
- 3-11-76 ✓ Filed Deft's Memo of Law in support of its motion to dimss the complt.
- 3-15-76 ✓ Filed Answering Affidvt of plttf to deft's affidvt in support of motion to dismiss.
- 3-18-76 ✓ Filed Affidvt by F. H. Brown, for deft., in support of its motion for judgment. dismiss.
- 05-03-76 ✓ Filed notice of reassignment of this action to Haight, J.
- 05-10-76 ✓ Filed transcript of record of proceedings dated 3-19-76.
- 05-13-76 ✓ Filed Memo End on Pltff's. motion to put trial on calendar with priority. The
within motion for a trial preference was denied by oral decision made in
open court on 3-19-76. See transcript of hearing that date.....Brieant, J.
- 05-20-76 ✓ Filed Opinion #44447 - Deft's. motion for summary judgment is granted. The
Court declines to award counsel fees. The Clerk of this Court shall enter
judgment pursuant to Rule 58(1), F.R.Civ.P. that all relief shall be denied.
.....Brieant, J. (mailed notice)
- 05-24-76 ✓ Filed Judgment - That Deft. have judgment against the Pltff. denying all relief
and dismissing the complaint.....Clerk. Entered 5-25-76. (mailed notice)
- 6-4-76 ✓ Filed Pltff's Letter to Judge Brieant dtd 5-28-76 with Memo End
It is Ordered that the time within which plttf may appeal is enlarged
for an add'l period of 30 days beyond the granted by Rule 4FR App P. No
further ext. may granted...Breiant, J., mn
- 6-10-76 ✓ Filed Letter from Paul Weiss, Rifkind, Hartson & Garrison to Judge Brieant
Dtd 6-7-76
- 6-11-76 ✓ Filed Letter from C. H. Mount to Judge Brieant Dtd 6-9-76
- 9-8-76 ✓ Filed Pltff's Notice of Appeal to USCA frm dec dismissing comolt on 5-20-76..Copies mail
- 9-8-76 ✓ Filed Memo enbk of plttf's Notice of Appeal...Appellant is granted leave to proceed
in the Court of Appeals in forma pauperis..So Ordered. cc Brieant, J.

RAYMOND F. BURCHARDT, Clerk

By 